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Nos. 28, 38, 43, 44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NORTHERN LINES MERGER CASE

UNITED STATES OF AMERICA, Appellant
v.
INTERSTATE COMMERCE COMMISSION, et al.

CHARLES E. BRUNDAGE, et al., Appellants
v.
INTERSTATE COMMERCE COMMISSION, et al.

CITY OF AUBURN, Appellant
v.
INTERSTATE COMMERCE COMMISSION, et al.

LIVINGSTON ANTI-MERGER COMMITTEE, Appellant
v.
INTERSTATE COMMERCE COMMISSION, et al.

On Appeals from the United States District Court for the District of Columbia

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BRIEF FOR LIVINGSTON ANTI-MERGER COMMITTEE

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BRIEF FOR LIVINGSTON ANTI-MERGER COMMITTEE

OPINIONS BELOW

The opinion of the court below (A. 1)[1] is reported at 296 F. Supp. 853. The reports of the Interstate Commerce Commission (A. 61, 245, 463, 498, 1258) are found at 328 I.C.C. 205, 460; 331 I.C.C. 228, 869; and 333 I.C.C. 391.

JURISDICTION

Jurisdiction of the Court over this appeal rests on 28 U.S.C. 1253. The appeal is from the final order of a three-judge court in the United States District Court for the District of Columbia designated in accordance with 28 U.S.C. 2284 and 2325. The final order of the court below was entered November 20, 1968. Notice of this appeal was filed on December 12, 1968, pursuant to 28 U.S.C. 2101(b). The appeal was docketed on January 31, 1969. Probable jurisdiction was noted on February 24, 1969.

STATUTES INVOLVED

The following federal statutes and joint resolution of Congress are involved in this appeal, and the full text or pertinent parts thereof are set out in the appendix at the end of this brief:[2]

> An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route, approved July 2, 1864, 13 Stat. 365 (Liv. A. *infra*, 57).
>
> A Resolution authorizing the Northern Pacific Railroad Company to issue its Bonds for the Con-

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[1] "A." refers to the single appendix of appellants and appellees in Nos. 28, 38, 43, and 44, October Term, 1969 (Northern Lines Merger Case).

[2] This Livingston appendix, as distinguished from the single appendix of appellants and appellees referenced in footnote 1 and designated as "A.", is referred to as "Liv. A." Page citations thereafter refer to pages in this brief.

struction of its Road and to secure the same by Mortgage, and for other Purposes, approved May 31, 1870, 16 Stat. 378 (Liv. A. *infra*, 71).

Proviso in "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," approved July 1, 1898, 30 Stat. 597 at 621 (*infra*, 32-33).

An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes, approved June 25, 1929, 46 Stat. 41 (Liv. A. *infra*, 73)

An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes, approved March 3, 1871, 16 Stat. 573 (Liv. A. *infra*, 79).

An Act to supplement certain provisions of Federal law incorporating the Texas and Pacific Railway Company in order to give certain additional authority to such company, approved July 10, 1962, 76 Stat. 142 (Liv. A. *infra*, 80).

5 U.S.C. 556(b) and (d), 557(c), and 706 (Liv. A. *infra*, 82).

49 U.S.C. 5(2)(a) and (b) and (d) (Liv. A. *infra*, 85).

QUESTIONS PRESENTED

1. Is it necessary to the jurisdiction of the Interstate Commerce Commission over the proposed merger that Northern Pacific *Railway* Company own the franchise and right of way federally granted to Northern Pacific *Railroad* Company?

2. Does ownership of the franchise and right of way federally granted to Northern Pacific *Railroad* Company continue to vest in that company, an existing federal corporation which in no way participated in the merger applications, or was ownership validly transferred at foreclosure sale in 1896 to the present user and operator thereof, namely, Northern Pacific *Railway* Company, a Wisconsin corporation and a merger applicant?

3. Are the statutory prohibitions against merger and mortgage without congressional consent which were interlocked with the federal grant of the franchise and right of way to Railroad lawful obligations and restrictions binding not only upon Railroad but also upon Railway and the Commission?[3]

4. In the administrative and judicial proceedings below, did the Interstate Commerce Commission and the District Court give adequate consideration to the foregoing questions in compliance with requirements of the Interstate Commerce Act and the Administrative Procedure Act as well as with principles of administrative procedure and judicial review set forth in decisions of this Court?

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[3]Throughout this brief, Northern Pacific Railroad Company and Northern Pacific Railway Company are generally referred to as "Railroad" and "Railway," respectively.

STATEMENT OF CASE

The Livingston Anti-Merger Committee, an association of citizens residing in the City of Livingston, Montana, and neighboring communities including its Committee Chairman Warren R. McGee, has opposed what has come to be known as the Northern Lines merger from the outset of the administrative proceeding before the Interstate Commerce Commission. The Committee opposes the merger because of the adverse social and economic effects upon the City of Livingston and the surrounding area which the merger is expected to leave in its wake should it become a reality.

The Committee's appeal is from the final order of a three-judge District Court for the District of Columbia (A. 59) affirming orders of the Interstate Commerce Commission (A. 245, 463). These latter orders authorized the proposed merger of Great Northern Railway Company, Northern Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, and Pacific R.R. Co. into a new Delaware corporation, namely, Great Northern Pacific & Burlington Lines, Inc.; the I.C.C. orders also authorized related transactions, including the issuance of mortgage bonds on the merged properties.

The suit in the District Court arose on complaint by the United States, acting through the Department of Justice (A. 1275). Appellant, which had been an intervenor opposing the proposed merger in the antecedent administrative proceeding, intervened in the suit as plaintiff pursuant to 28 U.S.C. 2323 (A. 1295, 1302) and like the United States and other intervening plaintiffs, sought in its complaint to enjoin, annul and set aside the merger authorization orders (A. 1297). In affirming said orders, the three-judge District Court dismissed all of the complaints and the prayers therein. The record below as it affects this appeal is indicated herewith.

A. Proceedings before Hearing Examiner

At the administrative hearing in Billings, Montana, on June 22, 1962, the Livingston Anti-Merger Committee made a presentation of its case against the proposed merger. It submitted into evidence various economic impact type data through nine witnesses (Tr. 14013-58, 14076-78; Ex. 206-09–Tr. 14016, 14037).[4] Further, it sought to introduce, through oral and written testimony of an expert witness, data in support of its position on the substantive issues in this appeal, that is, the issue of ownership of the federally granted franchise and right of way included in the merger package, the related issue of the Commission's jurisdiction over the proposed merger, and the issue of the lawfulness of the proposed merger in view of the statutory prohibitions against merging and mortgaging the federally granted franchise and road (Tr. 14060-70; Ex. 210–Tr. 14066-67). The Committee's position on the last issue had been specifically identified in its petition for leave to intervene in the administrative proceeding (R. 123).[5]

The examiner sustained the merger applicants' objection to the proffered testimony of the Committee's expert witness on the grounds that the testimony amounted to a legal argument and that therefore it should be advanced in a legal brief (Tr. 14063-67). The examiner dismissed the objection that at the hearing on December 8, 1961, the President of Northern Pacific Railway Company, Robert S. Macfarlane,

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[4] "Tr." refers to the administrative hearing transcript; page numbers follow. "Ex." references exhibits submitted at the administrative hearing; exhibit identification numbers follow. The transcript page references thereafter locate where in the administrative proceeding the referenced exhibit was introduced, or was sought to be introduced, into evidence. All transcript citations to the testimony of the Livingston Anti-Merger Committee's witnesses and argument of its counsel are within that part of the record on appeal as certified by the court below which is identified by the court index reference number 95. The exhibits of the Committee's witnesses are located in that part of the record with the index reference number 108.

[5] "R." identifies the record on appeal as certified by the court below; the number following is an index reference to part of the record.

read into evidence a statement, including citations of statutes and court decisions, which was directed toward showing his company's right to proceed with the merger irrespective of the prohibitions against merger and mortgage in the federal charter (Tr. 1190-93).[6] At the same time, the examiner denied the Committee's motion to strike Mr. Macfarlane's testimony (Tr. 14065). While recognizing that a brief is no substitute for evidence in the record, the Committee did file a brief on January 3, 1963 (R. 123), as had been permitted by the examiner on the general subject matter of the rejected testimony of its expert witness.

In his advisory report to the Commission, dated August 24, 1964, the examiner acknowledged the substantive contentions of the Committee carried forward in this appeal. He dealt with the twin issues of ownership of the federally granted franchise and right of way and of the Commission's jurisdiction over the proposed merger by disclaiming responsibility for determining who owns properties in the proposed merger so long as the properties are claimed by and in possession of the applicant carriers (A. 1005-1008). He dismissed the Committee's contention that the statutory prohibitions of the federal charter are effective bars to the proposed merger as being without merit. In doing so, he basically held to the proposition, which was never developed, that Railway had acquired Railroad at foreclosure sale in 1896 free of the restrictions against merger and mortgage placed upon Railroad by its federal charter. The Committee filed its exceptions to the Examiner's report on January 11, 1965, and at Exception V carried forward its position on the substantive issues in the appeal (R. 125).

B. Decisions of Interstate Commerce Commission

On March 31, 1966, the Commission handed down two reports on the merger applications. The main report (A. 61) concluded that the merger would not be consistent with the public interest, and the merger applications were denied.

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[6]The transcript of Mr. Macfarlane's testimony referred to here and elsewhere in the brief is within R. 74.

The report gave no consideration to the twin issues of jurisdiction and ownership raised by the Committee nor did it give any consideration to the issue of statutory prohibitions in the federal charter. Rather, the report took for granted that all of the rights to the properties of Northern Pacific Railroad Company "were acquired by Northern Pacific [Railway Company] at foreclosure and sequestration sales following foreclosure in 1896 of mortgages placed on the railroad and land grant by the federal corporation" (A. 70).

The Commission's other report of March 31, 1966 (A. 1258) gave special treatment to the complaints of the Department of Justice and others that they were deprived of a full and fair hearing. The report noted, too, that the Committee charged the examiner on brief with possible "prejudgment" (A. 1259, footnote 2). In the course of reaching the conclusion that a "full and fair hearing wholly within the requirements of fundamental law was accorded all parties" (A. 1274), the Commission upheld the examiner's rejection of the testimony of the Committee's expert witness on the issues of jurisdiction, ownership and statutory prohibitions. Against the charge of "double standards" as to receiving legal argument in evidence—a charge made by the Department of Justice—the Commission found the "complete answer" in the fact that whereas there had been no objection to Mr. Macfarlane's redirect testimony, which related to matters first raised on cross-examination, there had been objection to the proffered testimony of the Committee's witness (A. 1268).

Following rehearing, the Commission issued its Report on Reconsideration and Further Hearing, dated November 30, 1967 (A. 245). This report approved the merger with certain conditions. There was nothing in the report evidencing that the Commission gave consideration to the issues which the Committee carried forward from the start of the administrative proceeding and which are principal subjects of this appeal. Presumably, the Committee's contentions were covered by the following catch-all language in the Commission's

report: "Any contentions and arguments not specifically discussed herein have been considered and found without material significance" (A. 345). In its Second Report on Reconsideration, dated April 11, 1968, which affirmed the basic merger authorization, the Commission continued to follow its pattern of attending to the Committee's economic impact arguments and ignoring the Committee's other contentions (A. 467-469). The Commission's Third Report on Reconsideration, dated June 17, 1968 (A. 498), construing one of the conditions of the merger prescribed by the Commission, is not independently contested.

C. Opinion of District Court

In its opinion of November 20, 1968, affirming the Commission's merger authorization orders and dismissing the complaints of the several plaintiffs seeking to enjoin, annul and set aside said orders, the court below acknowledged the ownership or title issue raised by the Committee and, after observing that it was one of "great magnitude" with a history "long in time and complicated in nature," the court chose to avoid deciding the issue on the merits and satisfied itself with the conclusionary statement that "the Commission did not err in refusing to disapprove the merger because of the Committee's challenge" (A. 55-56). For the purpose of the merger proceeding, resolution of the title issue in the court's opinion was not required. Although it reached the conclusion that there was no requirement to go into the title question, the court below recognized that should the title question be gone into later, some other result than the one now accepted by the Commission itself might be proved out. In such a circumstance, as the court below saw it, the court which found a different result would have to deal with its effects upon the then status of the merger (A. 57).

In addition to challenging the jurisdiction of the Commission on the basis of the ownership or title issue, the Livingston Anti-Merger Committee contended in its appeal to the

court below that the statutory prohibitions in Railroad's federal charter against merger and mortgage of the road in the absence of congressional consent preclude the lawfulness of a merger authorization inasmuch as the prohibitions are binding both on Railway, whose interests were derived in foreclosure proceedings, and on the Commission, which is bound by the provisions of a railroad company's federal charter. With respect to this material issue, the court below had nothing to say. The court below was also silent on the remaining contention of the Committee, that is, that the administrative proceeding before the Commission did not meet the procedural standards of statutory and case law.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission has no jurisdiction over the proposed merger for the reason that the franchise and right of way used and operated by Northern Pacific Railway Company, one of the merger applicants, and included in the merger package, are owned neither by that company nor by anyone else petitioning to be included in the merger.

The Commission's jurisdiction to approve and authorize rail mergers is circumscribed by section 5(2)(a) and (b) of the Interstate Commerce Act (Liv. A. *infra*, 85). Under this section, rail mergers subject to Commission authorization relate to mergers of properties and franchises owned by carriers applying for such authorization. This condition is supplemented by section 5(2)(d) of the Act (*ibid.*, 86), which gives the Commission authority to require the inclusion in a proposed merger of "another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion. . . ." The Interstate Commerce Act offers no basis for the Commission to exercise its merger approval authority over a franchise and transcontinental main line which are owned neither by any of the merger

applicants nor by another party petitioning to be brought into the merger.

Among the properties included in the proposed merger are the franchise and main line federally granted to Northern Pacific Railroad Company and since 1896, claimed and operated by Northern Pacific Railway Company (A. 68-70, 544-545; Tr. 1190-93). From the standpoint of this appeal, the Commission's jurisdiction to authorize the proposed merger is keyed to the issue of Railway's ownership of such properties.

Ownership of the franchise and right of way used and operated by Northern Pacific Railway Company continues to vest in Northern Pacific Railroad Company, an existing federal corporation kept alive and controlled by Railway. By the Act of July 2, 1864, 13 Stat. 365 (Liv. A. *infra*, 57), Congress created Railroad and granted to it the franchise and right of way. Since these properties cannot be alienated without congressional consent and since such consent has never been forthcoming, Railroad, though controlled by Railway, continues to be the owner of the properties. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 48-49; *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267.

Railway's claim that there was the necessary congressional consent is based on the Joint Resolution of May 31, 1870, 16 Stat. 378 (Tr. 1190-93). By the Joint Resolution (Liv. A. *infra*, 71), Railroad was authorized to issue bonds in aid of construction and equipment of the road and to secure the bonds by mortgage on its road and franchise. The Joint Resolution also provided for foreclosure in the event of default. A foreclosure proceeding took place in 1896 and as a result thereof, Railway took over Railroad's properties at foreclosure sale, and ever since used and operated the federally granted franchise and right of way as its own.

The nature of the 1896 foreclosure proceeding was laid bare by the District Court, the Circuit Court of Appeals and this Court in *Northern Pacific Ry. Co. v. Boyd*, 170 Fed. 779, *aff'd*, 177 Fed. 804, *aff'd*, 228 U.S. 482. There was no

actual foreclosure; there was foreclosure in form only. The consent decree of foreclosure was the climax of private dealings among the parties in interest, exclusive of the United States. Unless form is equated with substance, the foreclosure proceeding in 1896 was not within the meaning and intent of the Joint Resolution in the context of the well settled law prohibiting the private alienation of railroad franchises and properties. The situation comes within the ambit of the commentary by this Court in *Anderson v. Abbott*, 321 U.S. 349 at 366:

> ". . . If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another. . . ."

Apart from the fact that there was no actual foreclosure, there is still another consideration which derogates Railway's claim of ownership through the authority of the Joint Resolution of 1870. This consideration centers upon the unresolved issue of whether the three junior mortgages on Railroad's franchise, main line and other properties purportedly foreclosed in 1896 had ever been consented to by Congress pursuant to the statutory requirement of section 10 of Railroad's federal charter. That requirement reads:

> ". . . no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States."

Almost immediately following the passage of the Joint Resolution, Railroad issued $30.7 million of bonds and secured them by a mortgage on its system known as its First Mortgage and Trust Deed. This mortgage was foreclosed in 1875 and in the same year, Railroad's properties were struck off at public sale to a bondholders committee. Later the

properties were reconveyed to Railroad and were discharged from the lien of said First Mortgage and Trust Deed (for factual account of the 1870 mortgage and 1875 foreclosure and subsequent reconveyance to Railroad, see paragraph XII of the complaint and of the second amended answer in the *Boyd* case, *supra*, Printed Transcript of Record, pp. 4-42 at 31-35 and pp. 176-216 at 204-208).

As Boyd contended in his suit against Railway, the First Mortgage and Trust Deed of 1870 exhausted Railroad's mortgage placement authority under the Joint Resolution and since Congress gave no further consent to Railroad to place a mortgage on its properties, the subsequent junior mortgages in the 1896 foreclosure proceeding were without the congressional consent prescribed in Railroad's federal charter. Inasmuch as the courts in the *Boyd* case were all satisfied that the 1896 foreclosure was one of form only, and granted recovery to Boyd on that basis, there was no need to adjudicate the validity of the mortgages. The same issue as raised by Boyd was also raised in the foreclosure proceeding itself. But as a result of negotiations between the managers of the Northern Pacific reorganization, namely, J. P. Morgan & Co., and the parties raising the issue, namely, Wisconsin Central Company et al., there was no adjudication of the issue (Liv. A. *infra*, 90-92). The consent decree of foreclosure and sale dated April 27, 1896, reserved the issue, and the reservation was carried forward in the deeds of conveyances to Railway (*infra*, 27).

At the time of the foreclosure proceeding, Railway recognized the need for congressional authorization before it could succeed to Railroad's ownership; it sought enabling legislation, and it failed to secure same (*infra*, 29-32). The contemporary view of Congress toward Railway's takeover of Railroad's properties through the "foreclosure" proceeding in 1896 evidenced unwillingness to make any concession of ownership to Railway, Act of July 1, 1898, 30 Stat. 597 at 621 (*infra*, 32-33). The most recent pronouncement by Congress on the issue of ownership as between Railroad and Rail-

way was the Act of June 25, 1929, 46 Stat. 41 (16 U. S. C. (1970 ed.), 731). In that Act, Congress continued not to accept Railway's claim of title to the federally granted right of way.

So far as the courts are concerned, the ownership issue raised in this appeal has never been adjudicated. Until now, the issue has been shunted away from court decision.

II

By the Act of July 2, 1864, 13 Stat. 365 (16 U. S. C. (1970 ed.), 371), the United States created the Northern Pacific Railroad Company and authorized and empowered the company "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, namely, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly . . . to some point on Puget's Sound . . ."

By the same Act, the United States spelled out certain obligations and restrictions relating to the kind of railroad to be built and the manner of its management, use and operations. These obligations were part and parcel of the total package. They were statutory covenants interlocked with the grants of property and property rights conferred upon the company. Among other obligations and restrictions imposed by the federal charter were prohibitions against merger and mortgage of the road without congressional consent and reservation by Congress to add to, alter, amend, or repeal the federal charter at any time. Unless Congress decides to remove the prohibitions against merger and mortgage in the exercise of its reserve powers, Railroad is clearly bound by those prohibitions. Apropos hereto is the Court's statement of general law applicable to railroad charters and grants. In *Oregon & California R. Co. v. United States*, 238 U. S. 393 at 427, this Court stated the general law applicable to railroad charters and grants: "We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed."

If Railway's succession to Railroad's franchise and right of way is simply based on Railway's control of Railroad through ownership of approximately 97% of the latter's stock and virtually all of its bonds this is the position of the Livingston Anti Merger Committee there is no reason to suppose that such control gives Railway more leeway in managing Railroad's affairs than Railroad would otherwise have free of Railway's control Railway is no more entitled to force Railroad to commit an *ultra vires* act than Railroad itself is entitled to commit such an act Railway's control of Railroad in no way diminishes the effectiveness of the impositions of the federal charter

If, however, Railway's succession to Railroad's franchise and right of way is supposed to be based on Railway's ownership of the federal corporation's franchise and right of way resulting from the 1896 foreclosure proceeding this is the position of the Interstate Commerce Commission and Railway the prohibitions in the federal charter against merger and mortgage without congressional consent are still legal bars to the proposed merger It cannot be tolerated that a group of stockholders dealing with themselves through a state corporation can by a private transaction in the form of a judicial sale of properties and property rights strike down the impositions of Congress which accompanied its grant of the properties and property rights in the first place. The present owner of the federally granted franchise and right of way, whether or not Railway, holds them subject to the expressed limitations set by Congress *Union Pacific R Co v Mason City*, 199 U S 160

Congressional impositions in the federal charter of a rail carrier, being subject to change only by specific action of Congress, are binding upon the Interstate Commerce Commission The Commission has no authority to modify or nullify such impositions In the case of the amendment of July 10, 1962, to the Texas and Pacific Railway Company's federal charter of 1871 (Liv. A. *infra*, 79-81), wherein the federally chartered railroad company sought relief from cer-

tain of its charter provisions pertaining to its right of consolidating with other railroads and pertaining to its capital structure, Congress, the Interstate Commerce Commission and the Department of Justice all proceeded on the basis that provisions in a federal charter are subject to change only by an act of Congress, and are not comprehended by the Commission's "exclusive and plenary" authority or jurisdiction under section 5(11) or 20a(7) of the Interstate Commerce Act (*infra*, 46-49). The necessity in 1962 of Congress amending the 1871 charter of the Texas and Pacific Railway Company to accomplish objectives of that company is equally present in the case of the 1864 federal charter of the Northern Pacific Railroad Company if the proposed merger is to be lawful.

III

In its consideration of appellant's case in opposition to the merger, the Commission did not comply with the procedural requirements of the Interstate Commerce Act and the Administrative Procedure Act or with applicable decisions of this Court. More particularly, section 5(2)(b) of the Interstate Commerce Act obligates the Commission as a prerequisite to authorizing a rail merger to make a finding that the proposed transaction is within the scope of section 5(2)(a), the latter provision requiring that properties in the proposed merger be owned by the merger applicants (Liv. A. *infra*, 85). The Commission did not make such a finding, contenting itself with only a general, conclusionary declaration that the various merger transactions met with the statutory requirements (A. 345).

The Commission also failed to meet its basic obligation under the Administrative Procedure Act of including in its decisions a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. 557(c) (Liv. A. *infra*, 83). Neither with respect to the twin issues of ownership and jurisdiction nor with respect to the issue

of the statutory prohibitions in Railroad's federal charter as being legal bars to the proposed merger did the Commission fulfill the standard of performance required by this Court under the foregoing provision of the Administrative Procedure Act. See *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 at 489, where this Court insists that the Commission make basic findings before exercising its authority, and also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 at 167, where a Commission decision unsupported by suitable findings and analysis is regarded as unacceptable adjudicatory practice.

The conduct of the administrative hearing itself, wherein the presentation of the issues raised in this appeal was unreasonably hobbled, was also deficient from the standpoint of the standards prescribed by the Administrative Procedure Act, 5 U.S.C. 556(b) and (d) (Liv. A. *infra*, 82). Nor was the conduct of the hearing in keeping with court decisions reciting an administrative agency's duty to investigate all relevant issues and to assure itself that sufficient evidence is adduced. *Isbrandtsen Co., Inc. v. United States et al.*, 96 F.Supp. 833, *aff'd* 342 U.S. 950; *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620, *cert. denied*, 384 U.S. 941.

The court below did nothing to correct the errors in the administrative proceeding and defaulted in the exercise of its supervisory powers over the Commission. It failed to carry out its function of judicial review as defined at 5 U.S.C. 706 (Liv. A. *infra*, 84). It did not address itself at all to the issue of whether the statutory prohibitions against merger and mortgage were legal bars to the proposed merger and its consideration of the ownership issue resulted in the unacceptable conclusion that it was all right for the Commission not to become involved with the issue but that if another court, upon later being confronted with the issue, decided it otherwise, that court could work out the impact of its decision on then status of the merger. The position of the court below contrasts with this Court's decision in *Schwabacher v. United States*, 334 U.S. 182, where a lower court's order

affirming a rail merger authorization was reversed and remanded for the reason that a serious question in issue was left open.

ARGUMENT

I. OWNERSHIP OF THE FEDERALLY GRANTED FRANCHISE AND MAIN LINE RIGHT OF WAY NOW USED AND OPERATED BY NORTHERN PACIFIC RAILWAY COMPANY AND INCLUDED IN THE PROPOSED MERGER CONTINUES TO VEST IN THE ORIGINAL GRANTEE, NAMELY, NORTHERN PACIFIC RAILROAD COMPANY, AND SINCE RAILROAD IS NEITHER A MERGER APPLICANT NOR A PETITIONER FOR INCLUSION IN THE MERGER, THE INTERSTATE COMMERCE COMMISSION, UNDER 49 U.S.C. 5(2)(a) AND (b) AND (d), HAS NO JURISDICTION TO APPROVE THE PROPOSED MERGER OF RAILROAD'S FRANCHISE AND RIGHT OF WAY.

The foregoing argument raises the twin issues of ownership and jurisdiction. With respect to the ownership issue, the merger applicant Northern Pacific Railway Company claims to have succeeded to the federally granted franchise and right of way by virtue of foreclosure sale in 1896 (Tr. 1190-93). The Interstate Commerce Commission accepts Railway's position on the ownership issue (A. 68-70, 544-545, 1007-1008).

Livingston Anti-Merger Committee's first argument is presented under the following seven headings:

A. There can be no valid transfer of ownership of the federally granted franchise and right of way without congressional consent.

B. Congress never consented to any transfer of ownership of the federally granted franchise and right of way from Railroad to Railway.

C. Railway itself recognized that the foreclosure proceeding in 1896 was not sufficient basis for

establishing its title to the federally granted franchise and right of way.

D. Congress has refused to recognize Railway's claim of title to the federally granted franchise and right of way.

E. No court ever adjudicated the issue of ownership between Railroad and Railway.

F. It is necessary to the jurisdiction of the Interstate Commerce Commission over the proposed merger that the franchise and right of way federally granted to Northern Pacific Railroad Company be owned by Northern Pacific Railway Company.

G. Conclusion of Argument I.

The first argument proceeds accordingly.

A. There can be no valid transfer of ownership of the federally granted franchise and right of way without congressional consent.

The premise is fundamental and long-standing: the franchise and right of way of a railroad cannot be transferred to a new owner in the absence of specific authorization by the legislative body which granted the franchise and right of way in the first place. As stated in *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 48-49:

> "A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation."

In *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, this Court held that the right of way of Northern Pacific Railroad Company could not be transferred volun-

tarily. In *Memphis & Little Rock R. Co. v. Railroad Commissioner*, 112 U.S. 609, the Court held that a railroad company's franchise could not be the subject of transfer at a mortgage foreclosure sale in the absence of legislative authorization, and in *Gue v. Tide Water Canal Co.*, 65 U.S. 257, it was held that the absence of enabling legislation invalidated a nonvoluntary execution sale of a franchise and the property necessary for its exercise. Moreover, the tax exemption of the right of way conferred by Section 2 of the Northern Pacific Railroad Company charter (Liv. A. *infra*, 61) is nontransferable even in a mortgage foreclosure with express legislative authorization. *Morgan v. Louisiana*, 93 U.S. 217; *C&O Railway Co. v. Miller*, 114 U.S. 176. See *Rochester R. Co. v. Rochester*, 205 U.S. 236.

The application to the present case of the above principle of non-alienability without legislative authorization is clear. Since Congress, by the Act of July 2, 1864, 13 Stat. 365 (Liv. A. *infra*, 57), granted to Northern Pacific Railroad Company the franchise and right of way which are now used and operated by Northern Pacific Railway Company, ownership of that franchise and right of way with its privilege of tax exemption continues to vest in Railroad, an existing federal corporation, unless Congress consented to the transfer of ownership to Railway. See *United States v. Southern Pacific Co.*, 259 U.S. 214 at 234.

B. Congress never consented to any transfer of ownership of the federally granted franchise and right of way from Railroad to Railway.

The Commission, accepting the position of its hearing examiner, and the merger applicant Northern Pacific Railway Company have both proceeded on the premises that Railway owns the federally granted franchise and right of way by virtue of foreclosure proceeding in 1896 of certain mortgages, that such mortgages had been authorized by Congress in a Joint Resolution of May 31, 1870, 16 Stat. 378 (Liv. A. *infra*, 71), and that the Joint Resolution

implicitly carried with it the right of a purchaser to acquire title to the mortgaged properties at a foreclosure sale. In this manner, the Commission and Railway have sought to found the transfer of ownership of the franchise and right of way from Railroad to Railway upon congressional authorization (A. 68-70, 1007-1008; Tr. 1190-93). These premises must fall for the reason that there was no actual foreclosure. In this regard, upon analysis of the so-called foreclosure proceeding in 1896, this Court and the courts below found the foreclosure proceeding to be one of form only. Further, the issue of the validity of the mortgages foreclosed then—so far as Railroad's federally granted franchise and right of way were concerned (that is, apart from land grant lands and other properties)—had been reserved rather than adjudicated by the court issuing the consent foreclosure decree and is not known to have been adjudicated since.

1. *Foreclosure in Form Only*

Under the Joint Resolution, Congress authorized the Northern Pacific Railroad Company to issue bonds to aid in the construction and equipment of its road and to secure the same by mortgage. In this regard, the Joint Resolution related to the provision of section 10 of Railroad's federal charter (Liv. A. *infra*, 67) wherein it was specified that

> ". . . no mortgage or construction bonds shall ever be issued by said company on said road or mortgage, or lien made in any way, except by the consent of the Congress of the United States."

The Joint Resolution also provided for mortgage enforcement by foreclosure and public sale of the mortgaged properties in the event of default.

In the context of the encumbrances on the road and the obligations of the federal grantee which are spelled out in Railroad's charter, i.e., Act of July 2, 1864 (Liv. A. *infra*, 57) and in the further context of the settled nature of the law forbidding alienation of railroad franchises and rights of

way without legislative authorization, the Joint Resolution May 31, 1870 (Liv. A. *infra*, 71) does not properly admit to the interpretation that alienation of Railroad's ownership of its franchise and main line right of way could have been effected by a scheme of reorganization among bondholders and stockholders which had taken on the form of a foreclosure proceeding without having any of its substance. A federal railroad's franchise and right of way may not be alienated by a private, voluntary transaction, and an attempted alienation of a railroad's franchise and right of way does not become legitimized through the assumption of a form of foreclosure.

The nature of the transaction on which Railway rests its claim of ownership to the federally granted franchise and right of way—that is, the 1896 foreclosure proceeding (in which the United States was not a party)—is detailed in *Northern Pacific Ry. Co. v. Boyd,* 170 Fed. 779, *aff'd* 177 Fed. 804, *aff'd* 228 U.S. 482. The opinions of the circuit court, the court of appeals and this Court afford conclusive evidence that there was no actual foreclosure in 1896 and that the public sale following the foreclosure decree was simply the climax of a private agreement among parties in interest, exclusive of the United States, whereby stockholders of Railroad became stockholders of Railway and the property of Railroad, including its federally granted franchise and right of way, was supposed to become the property of Railway. In the same vein, the bondholders of Railroad were paid off with Railway's bonds, such bonds being secured by the same property as secured the bonds of Railroad.

In the above case, Boyd, a creditor of Railroad, sought to enforce his judgment against property which Railway had obtained from Railroad in the foreclosure proceeding. In deciding in favor of Boyd and rejecting Railway's defense that the foreclosure proceeding barred Boyd's recovery, the courts were required to analyze the nature of the transaction leading to the transfer of Railroad's properties to

Railway. Each court recognized the shadow character of the foreclosure proceeding, and the lower courts particularly referenced the role of the stockholders' interests which deprecated "actual foreclosure," frustrated the foreclosure proceeding which had begun in October 1893, and then consented to foreclosure in April, 1896, as part of a scheme of reorganization promulgated the month before whereby substantial benefits were assured the stockholders in the scheduled transfer of Railroad's properties to Railway.

The basic financial data fortify the courts' conclusion that there was no actual foreclosure and that the transaction was essentially a private agreement wherein stockholder interests, with the cooperation of bondholders, sought to retain their equity position vis-a-vis the federally granted franchise and right of way and loose themselves of the obligations attendant to those properties arising out of Railroad's federal charter. At the time of the nominal foreclosure proceeding in 1896, the value of Railroad's property to be foreclosed was set in the reorganization plan at $345 million; the cost of the railroad property subject to mortgage was $241 million; the value of 40 million acres of land grants which Railroad owned or was entitled to was unstated in the records; the bonds, unpaid interest and Receivers' Certificates aggregated $157 million and unsecured debts about $15 million. One month following the foreclosure sale at which the property was bought in for $61.5 million, Railway, in accordance with the reorganization plan, issued $190 million of new bonds, $75 million of preferred stock, and $80 million of common stock.

In its summary description of the transaction, the court of appeals in the *Boyd* case (177 Fed. 804 at 814-818) succinctly observed (*ibid.*, 816):

> "In brief, the bondholders received new bonds secured by the same property and permitted their old bonds to be used for the purpose of foreclosure, and to enable the stockholders to buy the property for their own use, the name to be held by a new company, composed of the stockholders of the old."

The same court went on to say (*ibid.*, 817-818):

> "From a consideration of the proceedings in the foreclosure suit, whereby was evidenced the general assent of all parties in interest to a decree of foreclosure, and the antecedent, concurrent, and subsequent documents and agreements, the conclusion seems inevitable that the parties to the agreement aimed to and did avoid the 'actual foreclosure' which was deprecated in the circular, and that the foreclosure which was had was a foreclosure in form and not in substance . . ."

In affirming, this Court gave the following characterization to the foreclosure transaction (228 U.S. at 502):

> ". . . There is no difference in principle if the contract or reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

2. *Issue of Validity of Mortgages*

Apart from the fact that there was no actual foreclosure, there is still another consideration which derogates Railway's claim of ownership through the authority of the Joint Resolution of 1870. This consideration centers upon the unresolved issue of whether the three junior mortgages[*] on Railroad's franchise, main line and other properties purportedly foreclosed in 1896 had ever been consented to by

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[*]Copies of these mortgages are set out in the printed hearing record of the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, 68th Congress, pursuant to Public Resolution No. 24, approved June 25, 1924 (hereinafter this record is designated as "JCC," the numbers following being page references to the record). The designations, dates and authorized amounts of these mortgages, for which the Farmers' Loan & Trust Co., New York City, was trustee in each instance, were: General Second Mortgage, November 20, 1883, $20 million (JCC 780 *et seq.*); General Third Mortgage, December 1, 1887, $12 million (JCC 810 *et seq.*); and Consolidated Mortgage, December 2, 1889, $160 million (JCC 827 *et seq.*).

Congress pursuant to the statutory provision of section 10 of Railroad's federal charter prohibiting the placement of a mortgage or lien on the road without congressional consent.

Paragraph XII of Boyd's complaint and Paragraph XII of Railway's second supplemental answer squarely raised this hard core issue of the mortgages' validity so far as the federally granted road was concerned (Printed Transcript of Record, pp. 4-42 at 31-35 and pp. 176-216 at 204-208). However, the issue was not adjudicated in the *Boyd* case. Since the courts all recognized that there was no actual foreclosure and that the nominal foreclosure was one of form only, and granted recovery to Boyd on that basis, there was no need to adjudicate the issue of the mortgages' validity.

In support of his allegation that the mortgages before the court in 1896 were void because of lack of congressional consent as required by section 10 of the federal charter, Boyd maintained that Railroad had already exhausted the mortgage authority granted to it by the Joint Resolution of May 31, 1870. For on or about July 1, 1870, shortly after the passage of the Joint Resolution, and more than a decade before the placement of the first of the three junior mortgages involved in the 1896 foreclosure proceeding, Railroad issued $30.7 million of bonds and secured them with a mortgage, known as its "First Mortgage and Trust Deed," covering the road and franchises along with other properties. Upon the company's later default, the trustees of the mortgage in 1875 initiated foreclosure proceedings; as a result thereof, a final decree of foreclosure and sale was secured and at the sale, the property was struck off to a committee of bondholders. Subsequently, pursuant to an earlier reorganization plan, the property was returned to Railroad and was discharged from the lien of the First Mortgage and Trust Deed. Thereafter, no further consent to place a mortgage on the franchise and road was forthcoming from Congress. The same issue of the validity of the junior mortgages was raised in the 1896 foreclosure proceeding. The aftermath thereof indicates that the issue was

withdrawn from the foreclosure proceeding at the instance of negotiations between the parties raising the issue and the managers of the Northern Pacific reorganization, that the court's final decree of foreclosure reserved the issue, and that subsequent deeds of conveyances involving railroad properties were subject to this reservation.

More particularly, on or about March 2, 1896, the Wisconsin Central Company, Wisconsin Central Railroad Company, and the Receivers thereof, who had intervened in the foreclosure proceeding initiated by Farmers' Loan & Trust Company as trustee of the three junior mortgages, filed a plea alleging that the mortgages and the bonds secured thereby were prohibited by Railroad's federal charter and were void. Shortly thereafter, Messrs. J. P. Morgan & Co., the managers of the Northern Pacific reorganization, negotiated a settlement with the Wisconsin Central parties whereby the latter withdrew their pleas and answer in the foreclosure suit and the argument upon the pleas set down for April 20, 1896, was adjourned. The terms of the settlement also included the following: ". . . any decree of foreclosure in the Northern Pacific suit shall contain a distinct reservation of and the sale had thereunder shall be expressly subject to, all rights and questions raised by the Wisconsin Central companies or their receivers, unless such questions shall have been previously adjusted or determined" (Liv. A. *infra*, 91). In keeping with the terms of this settlement, the consent decree of foreclosure and sale dated April 27, 1896, contained the following reservation, at paragraph XXIV thereof (JCC 1392 at 1408):

> "It is further ordered, adjudged and decreed that the claims, issues and equities raised by the Wisconsin Central Company and the Wisconsin Central Railroad Company and the Receivers thereof be reserved for further consideration by the Court, and that the sale of the first parcel of said mortgaged premises shall not affect such claims, issues and equities, and shall be made subject to such further orders or decrees as hereafter may be made by the Court in

respect of all and singular such claims, issues and equities."

The referenced "first parcel of said mortgaged premises" consisted of railroad properties of Railroad, including the right of way and franchises. Other properties of Railroad, including land grant lands and rights with respect thereto, were included in other parcels (*ibid.*, 1402 at paragraph XIX). No known judicial determination has ever been made of the "claims, issues and equities" reserved in the consent decree of foreclosure and sale (JCC 4663-4665).

The reservation in the decree was incorporated in the Special Master's Report of Sale of Mortgaged Property, dated July 25, 1896 (JCC 1420 at 1422-23), the Order Confirming Special Master's Foreclosure Sale, filed July 27, 1896 (JCC 1431 at 1433), and the deeds purporting to convey the road and franchise to Railway. See Special Master's General Railroad Deed, dated August 18, 1896 (JCC 605 at 615); Railroad Deed and Land Deed, dated October 15, 1896, by Northern Pacific Railroad Company to Northern Pacific Railway Company (JCC 624 at 634); Trustee's Deed, dated October 16, 1896 (JCC 636 at 646); Receivers' Deed, dated October 30, 1896 (JCC 648 at 653).

The anomaly of a court handing down a decree of foreclosure and sale and at the same time reserving for determination the issue of the validity of the mortgages is indicative of the lack of substance in the 1896 consent foreclosure proceeding, however "regular in form" it may have been. See *Boyd* case at 501. This Court's commentary in *Anderson v. Abbott*, 321 U.S. 349 at 366-67, has present application:

> " . . . Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another. Once the purpose of effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we were helpless to fashion the instruments for appropriate relief."

Wholly consistent with the cloud over its claim of ownership based on the foreclosure proceeding in 1896, the two general mortgages of Railway issued in January, 1897, namely, the Prior Lien Mortgage and the General Lien Mortgage (A. 419), each included provisions entitling Railway to convey and transfer all of the mortgaged and pledged premises, as an entirety "*to a railroad corporation at that time existing under and by virtue of the laws of the United States* or of any State thereof, and lawfully entitled to acquire the same" (emphasis supplied).[8] Railway, in effect, provided itself with an escape hatch. For should the advantage of being identified as a federal corporation become sufficiently imposing, Railway would be in an apparent position to "convey" its properties to Railroad and except for a 3% minority stockholders' interest in Railroad which never went along with the 1896 financial machinations, the stockholders of Railway would still be in command. In Railroad's history, there is precedent for this sort of transaction as the Committee of Bondholders who bought Railroad's properties at the 1875 foreclosure later found it advantageous to return to the status of a federal corporation and thereupon conveyed the foreclosed properties back to Railroad.[9]

3. *Summary of Point B*

In brief, the Joint Resolution of May 31, 1870, and the foreclosure proceeding in 1896 cannot properly be taken together as congressional consent to the transfer of ownership from Railroad to Railway of the federally granted franchise and right of way under the Act of July 2, 1864.

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[8]Copy of the Prior Lien Mortgage appears at JCC 4726 *et seq.*; copy of the General Lien Mortgage at JCC 4777 *et seq.* The special entitlement provisions in these mortgages appear at JCC 4768 and 4813, respectively.

[9]A brief account of this history is set out at paragraph XII of the aforementioned second amended answer of Railway in the *Boyd* case, Printed Transcript of Record at pp. 205-206.

Yet without this congressional consent, Railway's claim of ownership falls.

Railway's de facto succession to Railroad's franchise and right of way is grounded not on any transfer of ownership of same; rather it is grounded on Railway's ownership of approximately 97% of Railroad's stock and virtually all of its bonds. The distinction here is between ownership and control of the federally granted franchise and right of way. There is no gainsay that Railway controls the properties. The point is that Railroad, an existing federal corporation kept alive by Railway, still owns them.

C. Railway itself recognized that the "foreclosure" proceeding in 1896 was not a sufficient basis for establishing its title to the federally granted franchise and right of way.

During the 54th Congress while the consent proceeding to foreclose the three junior mortgages upon the franchise and properties of Railroad was pending before the federal district court for the Eastern District of Wisconsin, Railway itself acknowledged that congressional authorization beyond the Joint Resolution of May 31, 1870, was necessary to enable it to acquire title to Railroad's franchise and right of way at the scheduled "foreclosure" sale. Legislation which Railway caused to be introduced, testimony thereon by Railway officials, and related congressional reports all pointed to the general recognition that Railway needed enabling legislation to permit it to succeed to the ownership of Railroad's franchise and right of way. Several resolutions were introduced in the 54th Congress, 1st Session, "to facilitate the reorganization of the Northern Pacific Railroad Company." Among these resolutions were: H. Res. 168 (Liv. A. *infra*, 87); H. Res. 190, reported out with amendments after hearings before the House Judiciary Committee, H. Rep. 2181 (submitted by Representative Connolly for the Committee on the Judiciary); and S. Res. 124, reported out with amendments after hearings before the Senate

Judiciary Committee, Senate Rep. 776 (submitted by Senator Mitchell of Oregon for the Committee on the Judiciary).

At the hearing of May 15, 1896, on H. Res. 168, Mr. Victor Morawetz, counsel for the Reorganization Managers and a director of Railway, and Mr. Alexander T. Britton, an attorney for Railway, testified that it would be impossible for the franchise and transcontinental main line of of Railroad to be transferred to Railway at the foreclosure sale then scheduled for the month of July, 1896, without the kind of congressional authorization provided for in the House Resolution. The testimony of Mr. Britton before the House Committee on the Judiciary in response to questions of Chairman David B. Henderson and Represenative Thomas Updegraff was specific (unprinted hearings in files of National Archives and Records Service, pp. 11-12 of second transcript):[10]

"Mr. Updegraff:	When is the Northern Pacific Railroad to be sold?
Mr. Britton:	The sale takes place in July.
Mr. Updegraff:	Under the law, as it now stands, in case of sale, cannot they include the franchises?
Mr. Britton:	They cannot.
Mr. Updegraff:	Can you make a valid sale that does not include the franchises unless you get this legislation?
Mr. Britton:	No, sir; we cannot.
The Chiarman:	You mean to say that you cannot sell the property without this?
Mr. Britton:	No, sir."

Railway's testimony was well anchored in law. Even assuming there had been an actual foreclosure of valid mortgages within the meaning of the Joint Resolution of

[10] A certified copy of the hearing record has been transmitted to the Clerk of the Court.

May 31, 1870, Railway still would suffer from the disability of not having been designated by statute as a new federal instrumentality in place of Railroad. *Memphis and Little Rock R. Co. v. Commissioner*, 112 U.S. 609, 618-619. In his testimony before the House Committee on the Judiciary, Mr. Britton pinpointed this disability in the following terms (*ibid.*, pp. 10-11 of first transcript):

> " . . . the Supreme Court of the United States in the case of the Memphis Ry. against the Commissioner, 112 U.S., and a number of subsequent decisions in the same direction, held, without quoting the exact language, that the franchise is not subject to sale and transfer, unless it is made so by statute which also provides a mode for exercising it. And then the court went on to illustrate and to show that a purchaser at foreclosure would take up the physical property of the Company with such rights of operation as a natural person could enjoy, but that it would not take the right to be a corporation, unless the law which authorized sale of the corporate authority also provided the machinery for carrying the job into effect."

Also, since the privilege of tax exemption is not transferred to a purchaser at a foreclosure sale unless there is special legislative authorization, Railway's witnesses had a further stake in seeking enabling legislation inasmuch as section 2 of the federal charter provided that "the right of way shall be exempt from taxation within the territories of the United States." (Liv. A. *infra*, 61). *Morgan v. Louisiana*, 93 U.S. 217; *C&O Ry. Co. v. Miller*, 114 U.S. 176. Further, Railway, a Wisconsin corporation, was prohibited by Wisconsin law and the laws of the states where the land grant lands were located from owning, holding or enjoying non-railroad lands;[11] whereas Railroad, as a fed-

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[11] Wisconsin: Statutes 1889, sec. 1828; Minnesota: Statutes 1894, sec. 5877; North Dakota: Revised Codes 1895, sec. 2497; Montana: Codes 1895, Title VIII, sec. 894; Idaho: Revised Statutes 1887, sec. 2666; Oregon: Hill's Annotated Codes and Laws 1887, Vol. 2, sec. 3221. See *Case v. Kelly*, 133 U.S. 21, 27-28.

eral corporation, had the legal capacity to own, hold and enjoy such lands. In addition, the consolidation of Railroad and Railway was prohibited by sections 1 and 3 of Railroad's federal charter (Liv. A. *infra*, 57-62). *United States v. Northern Pacific Railroad Company*, 95 Fed. 864, 867; *aff'd*, 177 U.S. 435.

Railway's assessment of its position at the time as needing special congressional authorization was altogether correct: in the absence of the legislation, Railroad was not competent to transfer and Railway was not competent to receive. Senator Mitchell, in remarks on the floor of the Senate on June 5, 1896, about proposed enabling legislation, stated the situation thus (Cong. Rec., 54th Cong., 1st Sess., p. 6139):

> "This new company, or proposed new company, are before Congress asking for certain rights, asking for the grant of a franchise, to be a corporation, and to exercise all the functions of a national corporation, which they cannot exercise at all unless in pursuance of an act of Congress."

Congress, however, did not pass any enabling legislation. Railway went ahead with the foreclosure proceeding and since then, reversed its position about the necessity for further congressional authorization.

D. Congress has refused to recognize Railway's claim of title to the federally granted franchise and right of way.

Apart from Congress' failure to pass enabling legislation sought by Railway, the contemporary view of Congress toward Railway's takeover of Railroad's properties through the "foreclosure" proceeding of 1896 was evidenced by a proviso in the Act of July 1, 1898, 30 Stat. 597 at 621. This Act, making appropriations for sundry civil expenses of the government for fiscal year ending June 30, 1899, included consideration of land grants to Northern Pacific

Railroad Company, and in that connection, Congress made the following proviso:

> "*And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor to the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted."

The most recent pronouncement by Congress on the issue of ownership as between Railroad and Railway was the Act of June 25, 1929, 46 Stat. 41 (Liv. A. *infra*, 73). In that Act, which was for the purpose of removing the cloud upon the title of lands belonging to the United States as a result of claims by Railroad and Railway, Congress left open the question of title to the federally granted right of way. By referring in the Act to the "present title" of Railroad or Railway or a subsidiary of either or both in the federally granted right of way, Congress effectively asserted that so far as it was concerned the ownership issue raised in this appeal has not been settled. Section 4 of the Act provides (*ibid.*, 75):

> "Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company, or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the

> Northern Pacific Railway Company in the operation of said road."

The allusion to Railway as having used the right of way in "good faith" would appear to reinforce the view that Congress has not consented to any transfer of Railroad's ownership and has simply acknowledged the reality of Railway's undenied control.

Section 3 of the Act of June 25, 1929, is also of note. Therein Congress reasserted its reservation of rights heretofore established at section 20 of Railroad's federal charter and at section 2 of the Joint Resolution of May 31, 1870 (*ibid.*, 74):

> "Sec. 3. The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; * * *."

This specific affirmation by Congress was indeed an idle gesture if at the time, the provisions of the federal charter and the Joint Resolution amounted to nothing but an enumeration of rights and obligations running to and from a shell of an inactive federal railroad corporation with no property of its own.

E. No court ever adjudicated the issue of title between Railroad and Railway.

Though there have been several passing references in court decisions which appear to support Railway's claim of title to the federally granted franchise and right of way, the issue of title has never been the subject of adjudication. The cases cited by the court below are illustrative of this point, namely, *United States v. Northern Pacific Ry. Co.* (the *Land Grant* case), 311 U.S. 317 at 328; *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482 at 502; and *Landell*

v. Northern Pacific Ry. Co., 122 F.Supp. 253, *aff'd* 96 U.S. App. D.C. 24, 223 F.2d 316, *cert. denied* 350 U.S. 844.

In the *Boyd* case, the question before the court was not one of title but of creditor's rights. This Court's passing reference to Railroad's divestiture of title came in the following context. After describing the private, non-adversary character of the foreclosure proceeding and noting a decree of foreclosure and sale was entered with "no one opposing," the Court stated (228 U.S. at 506):

> "Two months later the property was sold to the agreed purchaser at the upset price named in the decree. In a few days and by consent that sale was confirmed. As between the parties and the public generally, the sale was valid. As against creditors, it was a mere form. Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a non-assenting creditor. They had changed the name but not the relation. The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale."

Elsewhere the Court remarked of the foreclosure and sale (*ibid.*, 502):

> " . . . the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor."

The above "title language" does not answer the present challenge to Railway's claim of ownership of the federally granted franchise and right of way. The ownership issue here was not before the Court then. The most the Court decided about Railway's title was that Boyd's recovery could not be based on a defect in Railway's title on account of any fraud in the reorganization transaction. The Court,

in effect, distinguished between a fictitious type of foreclosure, or a foreclosure in form only, and a fraudulent one, and went on to find for Boyd because of the priority of rights of creditors over those of stockholders.

The issue here is whether the fictitious type of foreclosure proceeding in 1896 together with the Joint Resolution of May 31, 1870, affords the basis for a transfer of ownership in light of the well settled law prohibiting alienation of railroad franchises and rights of way without specific legislative authorization. Once more the issue is ownership not control.

In seeking to parry Livingston Anti Merger Committee's challenge to Railway's claim of title, but without deciding the merits of the challenge, the court below quoted language from this Court's decision in the *Land Grant* case, as follows (A. 561):

> "The corporation chartered by Congress [the Railroad Company] operated the road until receivers were appointed in 1893. Pursuant to foreclosure proceedings the Northern Pacific Railway Company [the applicant] acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." 311 U.S. at 328.

Again, the Court's language is in no way a holding dispositive of the merits of the present argument. The *Land Grant* case was brought as a result of the Act of June 25, 19[illegible], 46 Stat. 41 (Liv. A. *infra*, 73), which directed the prosecution of suits by the United States to remove the cloud cast upon titles of its lands as a result of claims by Railroad and Railway. The subject matter of these suits was not the federally granted franchise and main line right of way. As noted earlier (*supra*, 33), section 4 of the underlying Act placed the issue of ownership as between Railroad and Railway outside the Act's scope. Further, the admissions in the pleadings, stipulations and disclaimers of the

parties in the *Land Grant* case foreclosed the issue of ownership from being adjudicated.[12]

The third case noted by the court below as authority for avoiding consideration of the merits of the present challenge to Railway's claim of title was the *Landell* case. There the court, without trial, entered a summary judgment under Rule 56 of the Federal Rules of Civil Procedure dismissing the complaint of minority stockholders in Railroad because of laches. The merits of the ownership issue were left unanswered.

F. It is necessary to the jurisdiction of the Interstate Commerce Commission over the proposed merger that the franchise and right of way federally granted to Northern Pacific Railroad Company be owned by Northern Pacific Railway Company.

The Commission's jurisdiction to approve and authorize rail mergers is circumscribed by section 5(2)(a) and (b) of the Interstate Commerce Act. Under this section, rail mergers subject to Commission authorization must involve properties or franchises of carriers applying for such authorization (Liv. A, *infra*, 85):

> "§ 5, *par. (2). Unification, mergers, and acquisitions of control.*

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[12]In *Schmidt v. United States*, 102 F.2d 589, appeal applications denied, 308 U.S. 508, the Court of Appeals pointed out (page 596) that by virtue of admissions in the pleadings the question of who owned the Northern Pacific franchise and main line right of way had been removed from the *Land Grant* case. Stipulations and admissions do not foreclose legal questions. Unless there is an actual controversy between adverse litigants, there is nothing upon which the judicial power is capable of acting. *Case, et al. v. Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106 at 114; *Muskrat v. United States*, 219 U.S. 346 at 361-362; *Reynolds v. Stockton*, 140 U.S. 254 at 265; *Cromwell v. County of Sac*, 94 U.S. 351 at 353. When Railroad, the federal corporation, made pleading admissions, stipulation and disclaimer of title in the *Land Grant* case, approximately 97% of Railroad's stock was held by Railway.

> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph–
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; . . .
>
> (b) . . . If the Commission finds that . . . the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . ."

These provisions are supplemented by Section 5(2)(d) of the Interstate Commerce Act (*ibid.*, 86) which gives the Commission authority to require the inclusion in a proposed merger of "another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion . . . ."

Among the properties included in the proposed merger are the franchise and main line federally granted to Northern Pacific Railroad Company and since 1896, claimed and operated by Northern Pacific Railway Company (A. 68-70; Tr. 1190-93). Under the foregoing provisions of the Interstate Commerce Act, the Commission's jurisdiction to authorize the proposed merger is keyed to Railway's ownership of such properties. If Railway does not own the federally granted franchise and right of way, and since there are no claims to them by a petitioner seeking to be a part of the merger, the Commission has no authority under the statute to approve the proposed merger. The Interstate Commerce Act offers no basis for the Commission to exercise its merger approval authority over a franchise and transcontinental main line which are owned neither by any of the merger applicants nor by another party petitioning to be brought into the merger.

Further, the jurisdictional character of section 5(2)(a) of the Interstate Commerce Act is indicated by the provision

at section 5(2)(b) that as a condition to approving a merger, the Commission must find that "the proposed transaction is within the scope of subdivision (a) of this paragraph . . . ." For the proposed merger to be within the scope of said subdivision (a), it is necessary that ownership of the federally granted franchise and main line, which are integral parts of the merger package, be vested in one of the merger applicants, that is, Northern Pacific Railway Company. If ownership vests elsewhere–as claimed in this appeal--the Commission has no merger approval jurisdiction.

Contrary to the foregoing, the examiner asserted jurisdiction over the federally granted properties simply on the basis that they were in possession of and claimed by Railway (A. 1007). In effect, he blurred the distinction between ownership and claim of ownership with possession; by equating the two, he diluted the jurisdictional requirement. The approving Commission confined itself to making an ultimate finding that the proposed merger was within the scope of section 5(2) of the Interstate Commerce Act (A. 345); it said nothing about the ownership issue and took for granted its jurisdiction over the merger.

G. Conclusion of Argument I.

Ownership of the federally granted franchise and right of way continues to vest in the original grantee, Northern Pacific Railroad Company, an existing federal corporation kept alive and controlled by the merger applicant, Northern Pacific Railway Company. Railway's de facto succession to Railroad is based on its 97% control of Railroad's stock and virtually all of its bonds. Railway's claim of ownership of the franchise and right of way is unfounded, being based on essentially private transaction with the facade of foreclosure. At the time of the private dealings in 1896, Railway itself recognized the need for congressional authorization in order for it to be placed in Railroad's shoes. But Congress never acted. Later, in precise language, Congress refused to

concede that by virtue of the foreclosure proceeding, Railway was Railroad's lawful successor in ownership of lands federally granted to Railroad. In its most recent consideration of Railroad's federal charter, Congress treated the charter as a still meaningful document and while it recognized the reality of Railway's use of the federally granted right of way, it did not accept Railway's claim of ownership. Additionally, no court has ever adjudicated the issue of who owns the federally granted franchise and right of way.

Since the jurisdiction of the Interstate Commerce Commission to authorize the proposed merger requires either that Railway itself own the federally granted franchise and right of way or that Railroad petition to be included in the proposed merger and since neither of these requirements is able to be satisfied, the Commission is without jurisdiction to authorize the merger of Railroad's franchise and right of way with those of other lines. There are boundaries to the Commission's merger-approving authority; the Commission here has exceeded them.

II. WHETHER OWNERSHIP OF THE FEDERALLY GRANTED FRANCHISE AND RIGHT OF WAY VESTS IN RAILROAD OR RAILWAY, THE STATUTORY PROHIBITIONS AGAINST MERGER AND MORTGAGE WITHOUT CONGRESSIONAL CONSENT WHICH WERE INTERLOCKED WITH THE GRANT OF THE FRANCHISE AND RIGHT OF WAY IN THE FEDERAL CHARTER REMAIN AS ENCUMBRANCES UPON THE ROAD AND ARE LAWFUL RESTRICTIONS BINDING UPON RAILROAD, RAILWAY AND THE COMMISSION.

The above argument is independent of the previous twin issues of ownership and jurisdiction. It focuses on the continuing binding character of the obligations under the federal charter. In principle, whoever enjoys the benefits of the charter—whether Railroad or Railway—may not escape the burdens of the charter. Further, the burdens of the charter as imposed by Congress may be changed or lifted only by

Congress and may not be modified or nullified by the Interstate Commerce Commission.

The argument is sustained under three parallel headings: the statutory provisions in Railroad's federal charter prohibiting merger and mortgage without congressional consent are binding upon–

A. Railroad

B. Railway

C. Interstate Commerce Commission

The argument is recapitulated under a fourth heading: D. Conclusion of Argument II.

A. The statutory provisions in Railroad's federal charter prohibiting merger and mortgage without congressional consent are binding upon Railroad.

By the Act of July 2, 1864, 13 Stat. 365 (Liv. A. *infra*, 57), the United States created the Northern Pacific Railroad Company as "a body corporate and politic, in deed and in law" and authorized and empowered the company "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, namely, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly . . . to some point on Puget's Sound." The United States vested the company with all the powers, privileges, and immunities to carry into effect the purposes of the Act, otherwise known as the company's federal charter. Under the Act, too, the United States gave to the company some 43 million acres of nonmineral public lands to aid in the construction of the railroad and telegraph line and a tax exempt right of way 400 feet in width and approximately 2100 miles in length.

By the same Act, the United States spelled out certain obligations and restrictions relating to the kind of railroad to be built and the manner of its management, use and operations. These obligations were part and parcel of the total package. They were statutory covenants interlocked

with the grants of property and property rights conferred upon the company. The obligations and restrictions imposed by the federal charter, apart from matters of internal corporate procedure, pertained to the requirement of a "continuous" line (Section 1), use of right of way for railroad purposes (Sections 1, 2, 3, 11 and 20), reservation to the United States of certain mineral rights (Section 3), availability of railroad to the United States for "postal, military, naval, and all other government service" (Sections 3, 11 and 20), ceiling limitation upon rates which may be charged to the government (Section 5), and reservation by Congress to add to, alter, amend or repeal the federal charter at any time (Section 20). Prohibitions against merger and mortgage of the road without congressional consent were also impositions of the federal charter.

Section 3 of the Act permits another railroad company to merge into Railroad if the latter's route is on the line of such other company's route and also if the route of such other company has theretofore been aided in construction by land grants. Otherwise no merger of Railroad is authorized. Sections 1 and 3 together are effective prohibitions against the merger of Railroad into another company and have been so construed in *United States v. Northern Pacific R. Co.*, 95 Fed. 864 at 876-877, *aff'd* 177 U.S. 435. Thus, in the absence of special congressional authorization, Railroad may not merge or be merged into the proposed new Delaware corporation.

Section 10 of Railroad's federal charter plainly states:

> " . . . no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States.

By the Joint Resolution of May 31, 1870, Congress did authorize Railroad to issue bonds to aid in the construction and equipment of the road and to secure the same by mortgage. However, this authorization was restricted to bonds for a specified purpose, and upon completion of construc-

tion and equipment of the road in 1887, the authority to mortgage the road was exhausted.[13] *East Tennessee, Virginia and Georgia Ry. Co. v. Frazier,* 139 U.S. 288; *Dupont v. Northern Pacific R. Co.,* 18 Fed. 467. Quite clearly, the authority of the Joint Resolution does not reach to the mortgage involved in the proposed merger.

So far as Railroad is concerned, the prohibitions against merger and mortgage in its own federal charter foreclose any lawful participation by it in the proposed merger. Unless Congress decides to remove those prohibitions in the exercise of its reserved powers to change the federal charter, Railroad is bound by the prohibitions in the Charter.

The federal charter of the Northern Pacific Railroad Company is a contract as well as law. Until repealed it has the constancy and command of both contract and law. If compliance with the charter is unreasonably onerous, Railroad must go to Congress both as the contracting party representing the government and also as the sovereign legislator. Section 12 of the federal charter provides that, "the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing . . . and shall be served on the President of the United States" (Liv. A. *infra,* 67). On December 29, 1864, such written acceptance was duly served on President Lincoln. The contract thus created has never been terminated. Apropos hereto is this Court's statement of general law applicable to railroad charters and grants: "We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed." *Oregon & California R. Co. v. United States,* 238 U.S. 393 at 427.

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[13]See footnote 7, *supra* 24, for dates of mortgages foreclosed in the 1896 proceeding, raising further question as to the validity of the last two in view of year of completion of the road.

B. The statutory provisions in Railroad's federal charter prohibiting merger and mortgage without congressional consent are binding upon Railway.

If Railway's succession to Railroad's franchise and right of way is simply based on Railway's control of Railroad through ownership of approximately 97% of the latter's stock and virtually all of its bonds—this is the position of the Livingston Anti-Merger Committee—there is no reason to suppose that such control gives Railway more leeway in managing Railroad's affairs than Railroad would otherwise have free of Railway's control. Railway is no more entitled to force Railroad to commit an *ultra vires* act than Railroad would be entitled itself to commit such an act. Railway's control of Railroad in no way diminishes the effectiveness of the impositions of the federal charter. Once more note is made of the rule of law concerning railroad charters as stated in *Oregon & California R. Co. v. United States, supra,* 43. See also *United States v. Southern Pacific Co.,* 259 U.S. 214 at 234.

If, however, Railway's succession to Railroad's franchise and right of way is supposed to be based on Railway's ownership of the federal corporation's franchise and right way resulting from the 1896 foreclosure proceeding—this is the position of the Interstate Commerce Commission and Railway—the prohibitions in the federal charter against merger and mortgage without congressional consent are still legal bars to the proposed merger. It cannot be tolerated that a group of stockholders of the federal corporation by becoming stockholders of the state corporation which received the properties of the federal corporation in a private, voluntary transaction under the legal form of a foreclosure sale can strike down the impositions of Congress which conditioned its grant of the properties to the federal corporation. The present owner of the federally granted franchise and right of way, whether or not Railway, holds them subject to the expressed limitations set by Con-

gress.[14] Of particular pertinence here are the restrictions against merger and mortgage without congressional consent and the reservation of congressional power to "add to, alter, amend, or repeal" the governing federal charter.

In *Union Pacific R. Co. v. Mason City*, 199 U.S. 160, this Court established precedent which would appear to secure the foregoing considerations. There, the Union Pacific Company, a Utah corporation, purchased at a judicial sale the federally granted properties of Union Pacific Railroad Company, a federal corporation created by Acts of Congress in 1862 and 1864, upon foreclosure of a mortgage on the latter's properties which had been authorized by Congress in 1865. The new company sought to deny the Mason City Company the use of a bridge which the predecessor company had built pursuant to an Act of Congress in 1871. Under this authorization the predecessor company was obliged to permit the use of the bridge to all railroad companies. The new company argued that this restriction was not applicable to it as purchaser at a judicial sale under a mortgage antedating the congressional direction concerning the open use of the bridge. In finding that the Mason City Company was entitled to use the bridge, this Court held that the foreclosure purchaser must abide by the obligations of the mortgagor which had been imposed by Congress. The Court gave effect to Congress' reservation of power in the federal corporation's charter whereby Congress retained the rights to "add to, alter, amend or repeal" it.

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[14] In testimony before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, *supra* 24, footnote 7, Alexander Britton, counsel for the Northern Pacific Railway Company, stated (JCC 309): ". . . as long as it [Railway] operates over the rails which were built by aid of grants of Congress, I think it recognizes and is properly subject to all the limitations and liabilities and obligations imposed upon the original company by the granting act." Railway's President Charles Donnelly provided the committee with parallel testimony, saying (JCC 522): ". . . the obligations imposed by the original act upon the old company do, of course, rest upon the new company. Whatever the old company had to do we had to do."

A fortiori, congressional impositions spelled out in the federal charter of Railroad and in being at the time of the execution of the mortgages nominally foreclosed in 1896 bind Railway as purchaser at Railroad's foreclosure sale. If the congressional imposition in the *Mason City* case deserved to be enforced against a foreclosure buyer, certainly the more significant impositions in Railroad's federal charter against merger and mortgage are proper subjects for enforcement against a buyer at a foreclosure amounting to a "private sale." See *Boyd* case, 228 U.S. at 502.

C. The statutory provisions in Railroad's federal charter prohibiting merger and mortgage without congressional consent are binding upon the Interstate Commerce Commission.

Congressional impositions in a federal charter of a rail carrier are subject to change only by specific action of Congress. In a recent case, where a federally chartered railroad company sought relief from charter provisions, Congress, the Interstate Commerce Commission and the Department of Justice all proceeded on the basis that provisions in a federal charter are not comprehended by the Commission's "exclusive and plenary" authority under section 5(11) of the Interstate Commerce Act or by the Commission's "exclusive and plenary" jurisdiction under section 20a(7) of the Act.

Consider the July 10, 1962 amendment of the 1871 federal charter of the Texas and Pacific Railway Company (Liv. A. *infra*, 79-81). Under provisions in its federal charter prior to the amendment, the Texas and Pacific Railway Company was precluded from consolidating with another carrier unless it was one "on the route prescribed in the first section of this Act" and the Texas and Pacific's capital authorization was limited to $75 million. The 1962 amendment eliminated the "on the route prescribed" limitation, increased the company's capital authorization to $100 million, and directly subjected to the Interstate Commerce Act all of the company's power and authority previously

granted by federal charter and amendments thereto. In commenting on the legislation which eventuated in the 1962 amendment, the supporting House Report stated (H. Rep. 1813, 87th Cong., 2d Sess., p. 2):

> "The primary purpose of this change in the charter is to put the railway on the same footing with the other railroads in the matter of acquiring securities or property of other railroads, always subject, of course, to Interstate Commerce Commission control." See Senate Report No. 1565, 87th Cong., p. 2.

The House Report also stated on the same page:

> "The 'route prescribed' is defined in the act as 'the most direct and eligible route' between Marshall, Tex. and San Diego, Calif. (Actually the T. & P. was extended only as far as El Paso, Tex.)
>
> "The quoted language makes it doubtful that the T. & P. could acquire the securities or property of, or trackage rights over, other railroads with which the T. & P. connects unless those railroads happen to run in a generally easterly-westerly direction, or in other words, along the 'route prescribed.' Generally in such cases, all other railroads are simply limited by the Interstate Commerce Act, and not so restricted by provisions such as those above quoted."

In supporting the legislation which preceded the actual amendment, the Interstate Commerce Commission offered no suggestion that its authority or jurisdiction under sections 5(11) and 20a(7) of the Interstate Commerce Act made it unnecessary to amend the federal charter of the Texas and Pacific Railway Company. By letter of April 18, 1962, the Commission's Committee on Legislation wrote to the Chairman of the House Interstate and Foreign Commerce Committee supporting the legislation and saying in part as follows (*ibid.*, 3-4):

> "The apparent intent of . . . section [3] of the proposed amendment, is that the Texas & Pacific shall be subject to the same kind and measure of regulation by the Commission as railroads orga-

> nized under State charters. To the extent that other carriers by railroad are not limited as to the carriers whose stock or properties they may acquire, subject to the provisions of the Interstate Commerce Act, removal of the limitations as to the Texas & Pacific, subject to such provisions, would be consistent with such intent."

Commenting on the same legislation, the Department of Justice, by letter of May 16, 1962, from the Deputy Attorney General to the House Committee Chairman, concurred in the above reasoning (*ibid.*, 5).

The parallel between the limitations on consolidation and capital structure set out in the charter of the Texas and Pacific Railway Company and the prohibitions against merger and mortgage set out in the charter of Northern Pacific Railroad Company is evident. The necessity in 1962 of Congress amending the 1871 federal charter of the Texas and Pacific Railway Company to accomplish objectives of that company is equally present in the case of the 1864 charter of the Northern Pacific Railroad Company if the proposed merger is to be lawful.

There are two other considerations bearing upon the Commission's lack of authority to modify or nullify the anti-merger provisions in Railroad's federal charter. First, the referenced "exclusive and plenary" authority relates to subject matter within the scope of the merger approval jurisdiction of the Commission. The proposed merger, however, for the reasons set out under Argument I, is outside the boundaries of that jurisdiction. Second, Congress' deliberate retention of its authority over Railroad's federal charter in the Act of June 25, 1929, 46 Stat. 41 (Liv. A. *infra*, 73) followed by nine years its grant to the Commission of the aforesaid exclusive and plenary authority under the Transportation Act of 1920 (Act of February 28, 1920, c. 91 §407, 41 Stat. 580). Such retention is indicative of the continuity of Congress' exclusive jurisdiction over the provisions of Railroad's federal charter. This interpretation is

borne out by the conduct of all parties concerned, including the Commission, in the recent Texas and Pacific case.

D. Conclusion of Argument II.

Regardless of the nature of Railway's succession to Railroad's federally granted franchise and right of way, Railway is obliged to deal with the federally granted franchise and right of way *cum onere*, that is, subject to the congressional impositions of the federal charter. Among others, these impositions include prohibitions against merger and mortgage without congressional consent. Further, as congressional impositions in a railroad charter are the commands of the Congress which are operative and obligatory until repealed, they, like other laws in the field of transportation, are binding upon the Interstate Commerce Commission.

III. THE COMMISSION AND THE COURT BELOW, IN FAILURE OF COMPLIANCE WITH APPLICABLE STANDARDS FOR ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW UNDER STATUTES AND DECISIONS OF THIS COURT, DID NOT GIVE ADEQUATE CONSIDERATION TO THE FOREGOING CONTENTIONS.

Section 5(2)(b) of the Interstate Commerce Act obligates the Commission as a prerequisite to authorizing a rail merger to make a finding that the proposed transaction is within the scope of Section 5(2)(a), the latter provision requiring that the properties in the proposed merger be owned by the merger applicants (Liv. A. *infra*, 85). The Commission never made this jurisdictional finding. In its report of March 31, 1966, disapproving the merger, the Commission did make the single sentence observation that Railway had acquired rights to Railroad's properties by virtue of foreclosure proceedings in 1896 (A. 70). But this observation, included in general descriptive material about Railway, is no more a finding on the ownership issue satisfying the statutory requirement than is the Commission's

all-encompassing "ultimate finding" wherein the Commission contented itself with a general, conclusionary declaration that the various transactions "met with the requirements prescribed by Section 5(2) and 20a and b of the act . . ." (A. 345). See *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 at 489, and cases cited therein, where this Court insists that the Commission make basic findings before exercising its authority.

The Administrative Procedure Act also imposes upon the Commission a statutory obligation regarding the contents of its decisions. Thus, independent of the provision in the Interstate Commerce Act, there was an obligation upon the Commission to make a finding on the material issue of ownership and to provide reasons therefor. The Commission had the same kind of obligation with respect to the issue of whether the statutory prohibitions in Railroad's federal charter against merger and mortgage are legal bars to the proposed merger. The Commissioner's reports had nothing to say about this issue. It was as though the issue had never been raised. In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 at 167, the Interstate Commerce Commission failed to offer an explanation for one of its decisions; this Court viewed the deficiency in the following terms:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act[15] will not permit us to accept such adjudicatory practice.

"[15] Section 8(b), 5 U.S.C. § 1007(b), provides that all decisions shall 'include a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented in the record.' "

There is also the question of the Commission's fulfillment of its obligation in connection with the conduct of the hearing itself. Pertinent parts of the Administrative Procedure Act provide that the hearing examiner's functions

shall be performed "in an impartial manner" and that a party "is entitled to present his case or defense by oral or or documentary evidence, to submit rebuttal evidence . . ." 5 U.S.C. § 556(b) and (d) (Liv. A. *infra*, 82-83). The fact was that the hearing examiner prevented the Committee from developing its case and rebutting adverse testimony on the hearing record (*supra*, 6-7) and the Commission upheld the examiner (*supra*, 8). To the contrary, the issues raised by the Committee which the examiner permitted to be treated only in legal brief were of such character and importance that the Commission itself should have pursued them on its own instead of resisting and avoiding them. An administrative agency has a duty to investigate all relevant issues and to assure itself that sufficient evidence is adduced. *Isbrandtsen Co., Inc. v. United States et al.*, 96 F.Supp. 883, *aff'd* 342 U.S. 950; *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620, *cert. denied*, 384 U.S. 941.

The court below did nothing to correct the errors in the administrative proceeding and defaulted in the exercise of its supervisory powers over the Commission. Under that part of the Administrative Procedure Act pertaining to judicial review, the court below was required to decide all relevant questions of law and statutory provisions to the extent necessary to decision and when presented. 5 U.S.C. 706 (Liv. A. *infra*, 84). The court failed to do so. It did not address itself at all to the issue of whether the statutory prohibitions against merger and mortgage were legal bars to the proposed merger and its consideration of the ownership issue resulted in the unacceptable conclusion that it was all right for the Commission not to become involved with the issue but that if another court, upon later being confronted with the issue, decided it otherwise, that court could work out the impact of its decision on the then status of the merger. The effect of the court's treatment of the ownership issue was to relieve the Commission of its statutory obligation of making a jurisdictional finding before exercising its merger approval authority. The position of

the court below contrasts with this Court's decision in *Schwabacher v. United States*, 334 U.S. 182, where a lower court's order affirming a rail merger authorization was reversed and remanded for the reason that a serious question in issue was left open.

With respect to the disposition of the Livingston Anti-Merger Committee's appeal by the court below, the observation by this Court in *American Ship Building Co. v. NLRB*, 380 U.S. 300 at 318, appears appropriate: "The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

CONCLUSION

For the foregoing reasons, the order of the court below should be reversed and the case remanded for the entry of an appropriate judgment permanently enjoining, annulling and setting aside the Commission's authorization of the proposed Northern Lines merger.

Respectfully submitted,

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APPENDIX TO BRIEF FOR

LIVINGSTON ANTI-MERGER COMMITTEE

(Liv. A.)

APPENDIX TO BRIEF FOR LIVINGSTON ANTI-MERGER COMMITTEE (Liv. A.)

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An Act Granting Lands To Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route [approved July 2, 1864, 13 Stat. 365].*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, Charles P. Kimball, Augustine Haines, Edwin R. W. Wiggin, Anson P. Morrill, Samuel J. Anderson, of Maine; Willard Sears, I. S. Withington, Josiah Perham, James M. Becket, A. W. Banfield, Abiel Abbott, John Newell, Austin L. Rogers, Nathaniel Greene, jnr., Oliver Frost, John A. Bass, John O. Bresbrey, George Shiverick, Edward Tyler, Filander J. Forristall, Ivory H. Pope, of Massachusetts; George Opdyke, Fairley Holmes, John Huggins, Philander Reed, George Briggs, Chauncy Vibbard, John C. Fremont, of New York; Ephraim Marsh, John P. Jackson, jr., of New Jersey; S. M. Felton, John Toy, O. J. Dickey, B. F. Archer, G. W. Cass, J. Edgar Thompson, John A. Green, of Pennsylvania; T. M. Allyn, Moses W. Wilson, Horace Whittaker, Ira Bliss, of Connecticut; Joseph A. Gilmore, Onslow Stearns, E. P. Emerson, Frederick Smyth, William E. Chandler, of New Hampshire; Cyrus Aldrich, H. M. Rice, John McKusick, H. C. Waite, Stephen Miller, of Minnesota; E. A. Chapin, John Gregory Smith, George Merrill, of Vermont; James Y. Smith, William S. Slater, Isaac H. Southwick, Earl P. Mason, of Rhode Island; Seth Fuller, William Kellogg, U. S. Grant, William B. Ogden, William G. Greene, Leonard Sweat, Henry W. Blodgett, Porter Sheldon, of Illinois; J. M. Winchell, Elsworth Cheesebrough, James S. Emery, of Kansas; Richard F. Perkins,

*Provisions particularly pertinent to this appeal appear in bold face.

Richard Chenery, Samuel Brannan, George Rowland, Henry Platt, of California; William F. Mercer, James W. Brownley, of Virginia; John H. B. Latrobe, W. Prescott Smith, of Maryland; Greenbury Slack, A. J. Boreman, of West Virginia; Thomas E. Bramlette, Frank Shorin, of Kentucky; John Brough, John A. Bingham, Oran Follett, John Gardner, S. S. L'Hommedieu, Harrison G. Blake, Philo Chamberlin, of Ohio; John A. Duncan, Samuel M. Harrington, of Delaware; Thomas A. Morris, Jesse L. Williams, of Indiana; Samuel L. Case, Henry L. Hall, David H. Jerome, Thomas D. Gilbert, C. A. Trowbridge, of Michigan; Edward H. Broadhead, Alexander Mitchell, Benjamin Ferguson, Levi Sterling, —— Marshal, of Wisconsin; J. C. Ainsworth, Orlando Humason, H. W. Corbett, Henry Failling, of Oregon; J. B. S. Todd, M. K. Armstrong, J. Shaw Gregory, J. Le Berge, of Dakota Territory; John Mullan, Anson G. Henry, S. D. Smith, Charles Terry, of Washington Territory; H. W. Starr, Platt Smith, Nixon Denton, William Leighton, B. F. Allen, Reuben Noble, John L. Davies, of Iowa; Willard P. Hall, George R. Smith, H. Gayle King, John C. Sargeant, of Missouri; William H. Wallace, of Idaho Territory; J. H. Lathrop, Henry D. Cooke, H. E. Merrick, of the District of Columbia, **and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Northern Pacific Railroad Company," and by that name shall have perpetual succession,** and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. **And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly** by the most eligible railroad route, as shall be determined by said com-

pany, within the territory of the United States, on a line north of the forty-fifth degree of latitude **to some point on Puget's Sound**, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than three hundred miles from its western terminus; **and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth**. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitu[t]e a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Melod*i*on hall, in the city of Boston, at such time as any five commissioners herein named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee, and Chicago, once a week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at

such times, and in such principal cities or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each state in which subscription books have been opened, at least fifteen days previous to *to* the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board, shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary, shall then deliver over to said directors all the properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners, and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

Sec. 2. *And be it further enacted*, **That the right of way through the public lands be, and the same is hereby granted to said "Northern Pacific Railroad Company," its successors**

and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

Sec. 3. *And be it further enacted.* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-

empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That **if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act**: *Provided, further*, **That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act**: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

Sec. 4. *And be it further enacted*, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

SEC. 7. *And be it further enacted*, **That the said "Northern Pacific Railroad Company" be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road.** And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disin-

terested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person dis-

qualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

Sec. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

Sec. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that

the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

Sec. 10. *And be it further enacted,* **That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.**

Sec. 11. *And be it further enacted,* **That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation.**

Sec. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

Sec. 13. *And be it further enacted,* That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, and they shall, from time to time, fix, determine, and regulate the fares,

tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

Sec. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said Company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

Sec. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the

said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

Sec. 16. *And be it further enacted*, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia, and Chicago; and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

Sec. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid.

Sec. 18. *And be it further enacted*, That said Northern Pacific Railroad Company shall obtain the consent of the

legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

Sec. 19. *And be it further enacted,* That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

Sec. 20. *And be it further enacted,* **That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.**

Approved, July 2, 1864.

A Resolution Authorizing the Northern Pacific Railroad Company To Issue Its Bonds for the Construction of Its Road and To Secure the Same by Mortgage, and for Other Purposes [approved May 31, 1870, 16 Stat. 378].*

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, **That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation**; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted

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*Provisions particularly pertinent to this appeal appear in bold face.

in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and **if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale**, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further*, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

Sec. 2. *And be it further resolved*, **That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.**

Approved, May 31, 1870.

An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes [approved June 25, 1929, 46 Stat. 41].*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of

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of the said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are situate, relieved and freed from all claims if any exist, which the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants *Provided*, That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

Sec. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

Sec. 3. **The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby**; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said

grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto.

Sec. 4. **The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.**

Sec. 5. **The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined,** and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said

resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

Sec. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the United States of indemnity lands within national forests and other Government reservations,

as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgment and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require.

Sec. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involving the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judgments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and

the judgment, or judgments, of such United States circuit court of appeals shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way, and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

Sec. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

Sec. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided,* That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

Excerpts from "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes," approved March 3, 1871, 16 Stat. 573.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John C. Fremont, James L. Alcorn, G. M. Dodge . . . and all such persons as shall or may be associated with them, and their successors, are hereby created a body politic and corporate in fact and in law, by the name, style, and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the bay of San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the pur[po]ses of this act.

* * * * *

*Provisions particularly pertinent to this appeal appear in bold face.

Sec. 3. That the capital stock of the Texas Pacific Railroad Company shall be fixed by the board of directors, at a sum not exceeding fifty millions of dollars, in shares of one hundred dollars; and **when the amount is so fixed, it shall never be increased except by consent of Congress.** . . .

Sec. 4. **That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by Congressional, State, or territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.**

An Act to supplement certain provisions of Federal law incorporating the Texas and Pacific Railway Company in order to give certain additional authority to such company [approved July 10, 1962, 76 Stat. 142].*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the powers conferred by the Act entitled "An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes", approved March 3, 1871 (16 Stat. 573), as supplemented by the Act of May 2, 1872 (17 Stat. 59), the Act of March 3, 1873 (17 Stat. 598), the Act of June 22, 1874 (18 Stat. 197), and the Act of February 9, 1923 (42 Stat. 1223), **The Texas and Pacific Railway Company shall have the right and authority, subject to the provisions of the Interstate Commerce Act and any Acts supplemental thereto, to acquire securities or stock of, or property from, any other carrier.**

*Provisions particularly pertinent to this appeal appear in bold face.

Sec. 2. **The capital stock of The Texas and Pacific Railway Company, heretofore fixed by its board of directors pursuant to the provisions of the Act of February 9, 1923, at $75,000,000 may be increased at any time in such amounts as do not result in more than $100,000,000 of such company's capital stock outstanding** and as are agreed to by resolution of its board of directors duly adopted in accordance with such company's bylaws and with the consent of the holders of a majority in amount of its then outstanding capital stock, expressed by vote in person or by proxy at a meeting of said stockholders called for the purpose upon such notice as such bylaws require. The provisions of the Act of February 9, 1923, with respect to the additional capital stock authorized by such Act (except with respect to the aggregate amount thereof), shall be applicable to the additional capital stock authorized by this Act and, in addition thereto, the par value of the capital stock of said company and the number of shares thereof shall, subject to the limitations of this Act, be in such amount as may be determined from time to time by resolution of such company's board of directors duly adopted in accordance with such company's bylaws and with the consent of the holders of a majority in amount of its then outstanding capital stock, expressed by vote in person or by proxy at a meeting of said stockholders called for the purpose upon such notice as such bylaws require.

Sec. 3. **All power and authority granted to The Texas and Pacific Railway Company by this Act, the Act incorporating such company, and Acts supplemental thereto, shall be subject to the provisions of the Interstate Commerce Act and any Acts supplemental thereto.**

Approved July 10, 1962.

Excerpts from Administrative Procedure Act as Revised and Now Codified*

5 U.S.C. § 556(b) and (d) (80 Stat. 386)—formerly § 7(a) and (c) of the Administrative Procedure Act prior to its revision and codification—provide (emphasis supplied):

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* * * * *

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. **The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner.** A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

* * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except

*Provisions particularly pertinent to this appeal appear in bold face.

on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. **A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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5 U.S.C. § 557(c) (80 Stat. 387)—formerly § 8(b) of the Administrative Procedure Act prior to its revision and codification—provides (emphasis supplied):

* * * * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. **All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—**

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

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5 U.S.C. § 706 (80 Stat. 393)—formerly § 10(a) of the Administrative Procedure Act prior to its revision and codification—provides (emphasis supplied):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) **hold unlawful and set aside agency action, findings, and conclusions found to be—**

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) **in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;**

(D) **without observance of procedure required by law;**

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Excerpts from Interstate Commerce Act

49 U.S.C. § 5(2)(a) and (b)—§5(2)(a) and (b) of the Interstate Commerce Act—provide in pertinent part (emphasis supplied):

(2) (a) **It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—**

(i) **for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership**; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) **Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission**, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the per-

*Provisions particularly pertinent to this appeal appear in bold face.

sons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. **If the Commission finds that,** subject to such terms and conditions and such modifications as it shall find to be just and reasonable, **the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.** . . .

* * * * *

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, **upon petition by such railroad or railroads requesting such inclusion,** and upon a finding that such inclusion is consistent with the public interest.

54th CONGRESS,
1st SESSION.

H. RES. 168.*

IN THE HOUSE OF REPRESENTATIVES

April 11, 1896.

Mr. Hartman introduced the following joint resolution; which was referred to the Committee on the Judiciary and ordered to be printed.

JOINT RESOLUTION

To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That **the purchasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold at judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said company thereon, may organize anew by filing in the**

*Provisions particularly pertinent to this appeal appear in bold face.

office of the Secretary of the Interior a copy of the deed or deeds conveying said railroad and property with a certificate, signed by a majority of them, setting forth the name adopted by them, the names, number, and residences, respectively, of its directors, and a copy of any plan of reorganization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors, and assigns shall, by the name specified in said certificate, have and be invested with all the estate, right, title, and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights, and powers the same as the Northern Pacific Railroad Company, and shall be subject to all the obligations and duties imposed by Congress upon said company, and may acquire and hold any property and branches of the Northern Pacific Railroad Company; and it may acquire and construct additional branches or feeders in any State as authorized by the laws thereof; and upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid it may from time to time issue such bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, and such stocks, preferred or common, as shall have been authorized by such plan: *Provided,* That except as such stock shall have been issued for property acquired under such plan, no additional stock shall be issued, except for money, labor, or property estimated at its actual cash value, to the par or face value of the stock, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien thereby created: *Provided,* That such successor company, its successors and assigns, shall sell to any applicant therefor for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre, any agri-

cultural land, lying more than one mile from said railroad and then unsold, heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but this proviso shall not apply to lands chiefly valuable for timber, coal, iron, or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder, merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found therein, and the right to take therefrom gravel for its own uses: *Provided, however,* That said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands as it shall deem necessary or advisable for use in any way in promoting and developing irrigation, through companies or associations organized under and subject to the laws of the States in which such lands are situated: *And provided further,* That neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock with or sell, convey, or lease said railway, or by other corporate action give control or management over and of the same, to any corporation, company, person, or association of persons owning, operating, or controlling a parallel and competing line of railway; and any contract entered into by said successor company in violation of the provisions hereof shall be null and void, and may be enjoined at the suit of the United States or any State in which said road or any part thereof is situate in any court of competent jurisdiction: *And provided also,* That nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or purchasers of any such lands from said company.

Extract from Material Submitted by Northern Pacific Railway Company to Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, Pursuant to Public Resolution No. 24, 68th Congress, Approved June 5, 1924. Pages 3482-3483 of Printed Hearings*

WISCONSIN CENTRAL SETTLEMENT

This matter has not yet been fully carried out. The basis of settlement is shown by the following correspondence:

New York, April 16, 1896

Messrs. J. P. Morgan & Co.
Managers of the Northern Pacific Reorganization.

My dear Sirs: Referring to my interview with your Mr. Coster, permit me to repeat in outline the terms of the proposed Northern Pacific-Wisconsin Central settlement:

1. As to all matters arising prior to August 15, 1893, the date of the Northern Pacific receivership, mutual releases of the parties and their properties shall be executed by the Northern Pacific Railroad Co. and its receivers on the one hand, and the Wisconsin Central Co., the Wisconsin Central Railroad Co., and their receivers, on the other hand.

2. All claims upon the $230,000 par value, of Wisconsin Central Co. "joint and several improvement" bonds, which were deposited as security for the fulfillment of the Northern Pacific Co.'s covenants under the leases, and are now held by the Wisconsin Central trustees, shall be released.

3. All questions growing out of operation subsequent to August 15, 1893 shall be reserved for future adjustment by the respective receivers or their successors.

4. It is understood that in conjunction with this proposition, the respective liabilities prior to August 15, 1893, on the part of the Wisconsin Central Co. and the

*Provisions particularly pertinent to this appeal appear in bold face.

Chicago & Northern Pacific Railroad Co. shall be mutually released.

5. Any questions and accounts between the Chicago & Northern Pacific receivers and the Wisconsin Central Companies' receivers since August 15, 1893, shall be promptly taken up and adjusted or referred to the courts for determination as speedily as practicable. This paragraph is to be carried into effect before any release is given to the Wisconsin Central companies under paragraph 4.

6. The pleas interposed by the Wisconsin Central companies and the answer interposed by their receivers in the Northern Pacific foreclosure suit, shall be withdrawn at your request.

7. Pending this settlement, the argument upon those pleas set down for April 20 shall be adjourned, and any decree of foreclosure in the Northern Pacific suit shall contain a distinct reservation of and the sale had thereunder shall be expressly subject to, all rights and questions raised by the Wisconsin Central companies or their receivers, unless such questions shall have been previously adjusted or determined.

In conclusion, it will, of course be understood that all parties shall exercise good faith, and make every reasonable effort to carry this settlement into full effect as nearly as possible according to its terms, but that neither party shall be personally responsible for any failure to accomplish the results proposed.

Yours very truly.

Edward W. Sheldon

New York, April 18, 1896

Edward W. Sheldon, Esq.
45 Wall Street, New York

Dear sir: We have your favor of the 16th instant which correctly repeats in outline the terms of the proposed Northern Pacific-Wisconsin Central settlement.

The proposition is hereby accepted by us, and we understand that it is likewise accepted by the reorganization committee of the Wisconsin Central Co., which kindly confirm.

Yours very truly,

J. P. Morgan & Co.,
Reorganization Managers

New York, April 18, 1896

My dear Sirs: I desire to acknowledge the receipt of your letter of to-day advising me of the acceptance of the proposition embodied in my own letter to you of the 16th instant, for the settlement of Northern Pacific-Wisconsin Central matters.

Owing to the absence of Mr. George Coppell, the chairman of the Wisconsin Central reorganization committee, no meeting of the committee has been had.

I understand that the proposition has been orally submitted to and approved by the Chairman and four other members of the committee of eight. Although I do not regard the formal action of this committee as necessary, I shall be glad, on Mr. Coppell's return, or earlier if you desire, and it is practicable, to secure a ratification of the action of the receivers, trustees, and the Wisconsin Central Companies.

Yours very truly

Edward W. Sheldon

Messrs. J. P. Morgan & Co.,
Reorganization Managers.